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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LANCE R. MARTIN,
12 CDCR # E-17299,

13 Plaintiff,

14 vs.
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16 T. HARRINSTON; L. MILLER;
17 C. OROZCO,

18 Defendants.
19
20

Civil No. 14cv2914 BEN (PCL)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[ECF Doc. No. 2]**

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(ii)
AND 28 U.S.C. § 1915A(b)(1)**

21 Lance R. Martin (“Plaintiff”), a state prisoner currently incarcerated at Richard J.
22 Donovan Correctional Facility (“RJD”) in San Diego, and proceeding pro se, has filed
23 a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983.

24 Plaintiff has not prepaid the \$400 filing fee mandated by 28 U.S.C. § 1914(a);
25 instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28
26 U.S.C. § 1915(a) (ECF Doc. No. 2).

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I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite the plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a prisoner and he is granted leave to proceed IFP, he nevertheless remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must also submit a "certified copy of the trust fund account statement (or institutional equivalent) for . . . the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then collects subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forwards them to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

In support of his IFP application, Plaintiff has submitted the certified copies of his trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CivLR 3.2.

¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statements,
 2 as well as the attached prison certificate issued by a senior accounting officer at RJD
 3 where he is currently incarcerated verifying his account history and available balances.
 4 Plaintiff's statements show an average monthly balance of \$27.57, average monthly
 5 deposits of \$100.00, and an available balance of \$5.40 in his account at the time of filing.
 6 Based on this financial information, the Court GRANTS Plaintiff's Motion to Proceed
 7 IFP (ECF Doc. No. 2) and assesses an initial partial filing fee of \$5.51 pursuant to 28
 8 U.S.C. § 1915(b)(1).

9 However, the Secretary of the CDCR, or his designee, shall collect this initial fee
 10 only if sufficient funds in Plaintiff's account are available at the time this Order is
 11 executed pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4)
 12 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action
 13 or appealing a civil action or criminal judgment for the reason that the prisoner has no
 14 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at
 15 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal
 16 of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds
 17 available to him when payment is ordered."). The remaining balance of the \$350 total
 18 fee owed in this case shall be collected and forwarded to the Clerk of the Court pursuant
 19 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

20 II.

21 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)

22 A. Standard of Review

23 Notwithstanding Plaintiff's IFP status or the payment of any partial filing fees, the
 24 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP
 25 and by those, like Plaintiff, who are "incarcerated or detained in any facility [and]
 26 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
 27 terms or conditions of parole, probation, pretrial release, or diversionary program," "as
 28 soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under

1 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,
 2 which are frivolous, malicious, fail to state a claim, or which seek damages from
 3 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*
 4 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
 5 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

6 All complaints must contain “a short and plain statement of the claim showing that
 7 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
 8 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
 9 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 10 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 11 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
 12 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
 13 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
 14 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

15 “When there are well-pleaded factual allegations, a court should assume their
 16 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 17 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
 18 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 19 allegations of material fact and must construe those facts in the light most favorable to
 20 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 21 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

22 However, while the court “ha[s] an obligation where the petitioner is pro se,
 23 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 24 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 25 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
 26 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
 27 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

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B. Access to Courts Claims

Plaintiff claims that Defendants have delayed in mailing confidential legal mail that he has submitted to them. Prisoners have a constitutional right to access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The right is limited to the filing of direct criminal appeals, habeas petitions, and civil rights actions. *Id.* at 354. Claims for denial of access to the courts may arise from the frustration or hindrance of “a litigating opportunity yet to be gained” (forward-looking access claim) or from the loss of a suit that cannot now be tried (backward-looking claim). *Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002); *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011) (differentiating “between two types of access to court claims: those involving prisoners’ right to affirmative assistance and those involving prisoners’ rights to litigate without active interference.”).

However, the plaintiff must allege “actual injury” as the threshold requirement to any access to courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. An “actual injury” is “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at 348; *see also Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury as the “inability to file a complaint or defend against a charge”). The failure to allege an actual injury is “fatal.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure to show that a ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting *Lewis*, 518 U.S. at 353 & n.4).

In addition, the prisoner must allege the loss of a “non-frivolous” or “arguable” underlying claim. *See Harbury*, 536 U.S. at 413-14. The nature and description of the underlying claim must be set forth in the pleading “as if it were being independently pursued.” *Id.* at 417. Finally, the plaintiff must specifically allege the “remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought.” *Id.* at 415.

1 Plaintiff's Complaint fails to allege the actual injury required to state an access to
 2 courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. Specifically, he
 3 has failed to allege how the delay in the mailing of legal documents resulted in an "actual
 4 prejudice with respect to contemplated or existing litigation, such as the inability to meet
 5 a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348; *Jones*, 393 F.3d at 936;
 6 *Iqbal*, 556 U.S. at 678.

7 Moreover, Plaintiff's Complaint also fails to identify or even nominally describe
 8 the non-frivolous or arguable nature of the underlying cause of action he either
 9 anticipated or lost as a result of Defendants' actions. *Harbury*, 536 U.S. at 416 ("[L]ike
 10 any other element of an access claim[,] . . . the predicate claim [must] be described well
 11 enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the
 12 underlying claim is more than hope.").

13 For these reasons, the Court finds Plaintiff's access to courts claims must be
 14 dismissed for failing to state a plausible claim upon which § 1983 relief can be granted.
 15 *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

16 **C. Grievance claims**

17 Plaintiff further alleges that prison officials have not adequately responded to his
 18 administrative grievances in violation of his Fourteenth Amendment due process rights.
 19 The Fourteenth Amendment provides that: "[n]o state shall ... deprive any person of life,
 20 liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The
 21 requirements of procedural due process apply only to the deprivation of interests
 22 encompassed by the Fourteenth Amendment's protection of liberty and property." *Board*
 23 *of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison regulations may
 24 grant prisoners liberty or property interests sufficient to invoke due process protection.
 25 *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). To state a procedural due process
 26 claim, Plaintiff must allege: "(1) a liberty or property interest protected by the
 27 Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of
 28 process." *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000).

1 However, the Ninth Circuit has held that prisoners have no protected *property*
2 interest in an inmate grievance procedure arising directly from the Due Process Clause.
3 See *Ramirez v. Galaza*, 334 F.3d 850, 869 (9th Cir. 2003) (“[I]nmates lack a separate
4 constitutional entitlement to a specific prison grievance procedure”) (citing *Mann v.*
5 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (finding that the due process clause of the
6 Fourteenth Amendment creates “no legitimate claim of entitlement to a [prison]
7 grievance procedure”)); accord *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (1995);
8 *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993).

9 In addition, Plaintiff has failed to plead facts sufficient to show that prison official
10 deprived him of a protected *liberty* interest by allegedly failing to respond to his prison
11 grievances in a satisfactory manner. While a liberty interest can arise from state law or
12 prison regulations, *Meachum*, 427 U.S. at 223-27, due process protections are implicated
13 only if Plaintiff alleges facts to show that Defendants: (1) restrained his freedom in a
14 manner not expected from his sentence, and (2) “impose[d] atypical and significant
15 hardship on [him] in relation to the ordinary incidents of prison life.” *Sandin v. Conner*,
16 515 U.S. 472, 484 (1995); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).
17 Plaintiff pleads nothing to suggest how the allegedly inadequate review and
18 consideration of his inmate grievances resulted in an “atypical” and “significant
19 hardship.” *Sandin*, 515 U.S. at 483-84. Thus, to the extent Plaintiff challenges the
20 procedural adequacy of inmate grievance procedures, these claims must be dismissed for
21 failing to state a plausible claim upon which § 1983 relief can be granted. See 28 U.S.C.
22 §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

23 Because Plaintiff is proceeding without counsel, and it is not “absolutely clear that
24 no amendment can cure” the defects of pleading set forth above, the Court will grant him
25 an opportunity to amend. See *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995);
26 *Lopez*, 203 F.3d at 1131; *Cervantes*, 5 F.3d at 1276-77.

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III.

CONCLUSION AND ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2) is **GRANTED**.

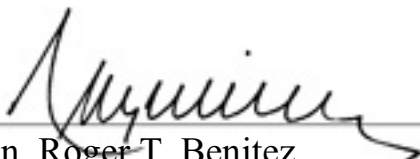
2. The Secretary of the CDCR, or his designee, shall collect the \$5.51 initial filing fee assessed by this Order from Plaintiff's prison trust account, and forward the remaining \$344.49 balance of the full fee owed by collecting monthly payments from Plaintiff's account in an amount equal to twenty percent (20%) of the preceding month's income to the Clerk of the Court each time the amount in Plaintiff's account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey A. Beard, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

IT IS FURTHER ORDERED that:

4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). However, Plaintiff is **GRANTED** forty-five (45) days leave from the date of this Order in which to file an Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to his original pleading. *See* S.D. CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

DATED: December 18, 2014


Hon. Roger T. Benitez
United States District Judge